4. Paragraph (1) gives a clear rule as to the time when a credit transfer is completed in the normal case; it is completed upon acceptance of a payment order by the "beneficiary's bank". Although the term "beneficiary's bank" is not defined in article 2, it has always been assumed to be the bank of the beneficiary as indicated in the originator's payment order (article 9, comment 8 and A/CN.9/344, para. 120). Therefore, acceptance of a payment order by a bank named as the beneficiary's bank because of a mistake by one of the banks in the credit transfer chain would not be acceptance by the beneficiary's bank. Instead, the bank would be obligated under article 7(3) to give notice to the sender that the payment order had been misdirected.

5. The Model Law may not give the same result if it was the originator that designated the incorrect beneficiary's bank, even though the bank would be equally unable to credit the beneficiary's account. It would seem that in this case as well the bank should have the obligations of article 7(3) to give notice to its sender that the payment order was misdirected.

6. A variant of the problem arises if the beneficiary's bank has been properly indicated but the beneficiary has been improperly indicated, either by the originator or by an error of one of the banks in the credit transfer chain. While article 17(1) would suggest that the credit transfer was completed, it would still seem appropriate that the bank should be obligated to notify the sender of the problem under article 7(3), since all that the bank knows is that it cannot identify the beneficiary. As far as the bank can tell, the payment order has been misdirected. Compare comment 13 in regard to paragraph (2).

7. The Model Law recognizes that acceptance of the payment order by the beneficiary's bank is completion of the credit transfer even if the payment order is for an amount larger or smaller than the amount in the payment order from the originator to the originator's bank. That result is specifically stated in paragraph (3) for cases in which the reason for the deficiency in amount is that one or more banks in the credit transfer chain deducted its fees from the amount of the transfer. It is also recognized for the general case by article 14, which obligates the bank that has sent its own payment order for an amount less than the amount of the payment order received by it to issue a payment order for the difference between the amounts of the payment orders, and by article 15, which provides that the overpayment can be recovered from the beneficiary "as ... otherwise provided by law."

8. Comparison with Article 4A. Article 4A-104(a) provides that "A funds transfer is completed by acceptance by the beneficiary's bank of a payment order for the benefit of the beneficiary of the originator's payment order." The acts of acceptance of a payment order by the beneficiary's bank are somewhat different in Article 4A-209(b) from those in article 8.

Paragraph (2)

9. The first draft of the Model Law prepared by the Secretariat for the seventeenth session contained a provision that authorized payment of an obligation by a credit transfer (A/CN.9/WG.IV/WP.37, article 16(1). The provision was redrafted for the eighteenth session (A/CN.9/WG.IV/WP.39, article 11(1)) following the decision of the Working Group at the seventeenth session that it would be appropriate to have such a provision (A/CN.9/317, para. 158). The paragraph was deleted at the twenty-first session

(A/CN.9/341, para. 12). The reasons given were that, while many legal systems already recognized credit transfers as an acceptable method of making payment, it was a matter of the policy of each State to decide whether a monetary obligation could be discharged by a credit transfer and that it might be contrary to the monetary policy of some States to consider credit in an account in a bank as having the same legal significance as money issued by a central bank.

10. Prior to the twenty-first session paragraph (2) provided that the obligation of the debtor was discharged when the beneficiary's bank accepted the payment order. The beneficiary's bank became indebted to the beneficiary at the same time. The drafting history of that prior provision is set forth in A/CN.9/WG.IV/WP.46, comments 5 to 9 to article 14. The current text was adopted at the twenty-first session (A/CN.9/341, paras. 13 to 17).

11. Although there was a widespread feeling in the Working Group that the Model Law should neither provide that a debtor had a right to discharge an obligation by transferring funds to the credit of the creditor in his bank account nor provide that if such a transfer was made the obligation would be discharged to the extent of the payment order received, there was a recognition that it would be useful to provide a rule that governed certain aspects of the discharge when the parties had agreed that the obligation could be discharged by a credit transfer. In particular, it was thought to be useful for the Model Law to indicate the time when such a discharge took place.

12. Paragraph (2) applies only if the transfer was for the purpose of discharging an obligation of the originator/debtor to the beneficiary/creditor and if that obligation could be discharged by credit transfer to the account indicated by the originator. Although it is unlikely that any State has a general prohibition against credit transfers, and especially international credit transfers, it is possible that certain obligations can be discharged only by payment in cash or by some other specified means. What is more likely is that in a given State an obligation is discharged by credit transfer to an account of the beneficiary only if the transfer is done with his consent. It may be that the consent need not be specific, that it could be implied from the very fact of having a particular type of account, from the indication of the bank account numbers on an invoice or from other similar circumstances.

13. Paragraph (2) provides that the obligation is discharged when the beneficiary bank accepts the payment order. Although not specifically so stated in paragraph (2), the payment order accepted by the beneficiary's bank must have directed credit to the proper account (see comment 6 in regard to para. 1). If the payment order was addressed to the proper account but the beneficiary's bank failed to credit the account or credited the wrong account, the obligation from the originator to the beneficiary is discharged and if the beneficiary suffered loss as a result of the misapplication of the credit, he must look to his bank for reparation under the law applicable to the account relationship.

14. Paragraph (2) provides that the obligation is discharged to the extent that it would be discharged by payment of the same amount in cash. The amount in question is the amount of the payment order accepted by the beneficiary's bank. If the beneficiary's bank charges a fee for receiving and processing the payment order, the fee is at the cost of the beneficiary. However, if the payment order accepted by the beneficiary's bank is for an amount less than

the amount in the payment order sent by the originator's bank as a result of fees charged by intermediary banks, the originator is not discharged of his obligation to the beneficiary to the extent of those fees. Compare paragraph (3) and comment 18.

15. In most cases when less than the full amount of the obligation is paid, the obligation is discharged to the extent of the payment. However, in some cases the obligation is indivisible and payment of less than the full amount does not operate as a discharge of any of the obligation (A/CN.9/328, para. 39). Those are questions that are settled by doctrines outside the law of credit transfers. However, in order to know the effect of a transfer of a sum that is less than the entire obligation, paragraph (2) provides that the obligation is discharged to the extent that it would be discharged by payment of the same amount in cash.

16. Comparison with Article 4A. Article 4A-406 has substantially the same rule in respect of time of discharge, subject to the qualification that the acts of acceptance of a payment order by a beneficiary's bank are slightly different in Article 4A-209(b) from those in article 8. Article 4A-406(c) provides that the extent of the discharge is the amount of the originator's payment order "unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges."

Paragraph (3)

17. Paragraph (3) is concerned with a problem that is difficult when credit transfers pass through several banks, even though the problem does not involve a significant amount of money. It could be expected that the originator would be responsible for all charges up to the beneficiary's bank. So long as those charges are passed back to the originator, there are no difficulties. When this is not easily done, a bank may deduct its charges from the amount of the funds transferred. Since it may be impossible for an originator to know whether such charges will be deducted or how much they may be, especially in an international credit transfer, it cannot provide for that eventuality.

18. At the twenty-first session the Working Group decided that paragraph (3) should be redrafted to state that the credit transfer was complete and the originator's bank had fulfilled its duty to the originator even though the amount of the payment order accepted by the beneficiary's bank was less than the amount of the payment order issued by the originator because of the fees that had been deducted by various banks in the transfer chain. It also decided that paragraph (3) should provide that completion of the transfer would not prejudice any right the beneficiary might have under other applicable rules of law to recover the balance of the original amount of the transfer from the originator, but that the paragraph should not purport to determine whether the originator or the beneficiary was ultimately responsible to pay the fees for the transfer (A/CN.9/341, para. 20). That decision was implemented at the twenty-second session by the current text of paragraph (3) (A/CN.9/344, paras. 139).

19. The last sentence in article 17(3) has the effect of countering a possible interpretation of article 14 that banks are prohibited from deducting their charges. Such an interpretation would arise out of the fact that article 14 provides that every receiving bank that executes a payment order for less than the amount of the payment order it accepted is obligated to

issue a payment order for the difference between the amounts of the two payment orders.

20. A provision that the originator's bank has fulfilled its obligations to the originator when the credit transfer is completed has not been included in paragraph (3), since it would seem to be a natural consequence of completion of the transfer.

21. Comparison with Article 4A. Article 4A-302(d) contains a prohibition on the collection of charges "by issuing a payment order in an amount equal to the amount of the sender's order less the amount of the charges ... " unless instructed by the sender to do so. Such a quasi regulatory provision could not be included in the text of the Model Law, but it could be included by any State when enacting the Model Law if that seemed desirable. Article 4A-406(c) provides that if charges of one or more receiving bank have been deducted (perhaps by a foreign bank) "payment to the beneficiary is deemed to be in the amount of the originator's order unless upon demand by the beneficiary the originator does not pay the beneficiary the amount of the deducted charges."

CHAPTER V. CONFLICT OF LAWS

Article 18. Conflict of laws

(1) The rights and obligations arising out of a payment order shall be governed by the law chosen by the parties. In the absence of agreement, the law of the State of the receiving bank shall apply.

(2) The second sentence of paragraph (1) shall not affect the determination of which law governs the question whether the actual sender of the payment order had the authority to bind the purported sender for the purposes of article 4(1).

(3) For the purposes of this article,

(a) where a State comprises several territorial units having different rules of law, each territorial unit shall be considered to be a separate State, and

(b) branches and separate offices of a bank in different States are separate banks.

Prior discussion

A/CN.9/297, paras. 34 to 36 (16th session, 1987)
A/CN.9/317, para. 165 (17th session, 1988)
A/CN.9/WG.IV/WP.42, paras. 69 to 80
A/CN.9/341, paras. 24 to 49 (21st session, 1990)
A/CN.9/344, paras. 112 to 114 and 140 (22nd session, 1990)

Comments

1. The Working Group at its seventeenth session requested the Secretariat to prepare a draft provision on conflict of laws (A/CN.9/317, para. 165). The

draft provision was prepared for the eighteenth session of the Working Group (A/CN.9/WG.IV/WP.39, article 12). The problem of conflict of laws was considered in more detail in the report of the Secretary-General to the nineteenth session of the Working Group, A/CN.9/WG.IV/WP.42, paras. 69 to 80. That report considered the issues especially in light of the decisions of the Working Group at its eighteenth session that the text under preparation should be in the form of a model law for adoption by national legislative bodies and that it should be restricted to international credit transfers. At the twenty-first session the Working Group made a number of policy decisions (A/CN.9/341, paras. 24 to 49) that were incorporated into the text at the twenty-second session (A/CN.9/344, para. 140).

Inclusion of conflict of laws provisions in the Model Law

2. At the twenty-first session there was a long discussion as to whether the Model Law should retain any provision on conflict of laws (A/CN.9/341, paras. 33 to 37). One objection to retaining any provision was that a certain number of States were already parties to bilateral or multilateral conventions on conflict of laws, and in particular to the Rome Convention on the Law applicable to Contractual Obligations between the member States of the European Communities, and that it would be difficult for those States to adopt any conflict of laws provisions that might be in the Model Law. A second objection was that no single conflicts rule would be appropriate for both high speed electronic transfers and paper-based transfers. A third objection was that, considering the complexity of the issues involved, the text before the twenty-first session did not have the degree of refinement that would make it acceptable to most States.

3. The Working Group decided to retain a provision on conflict of laws, primarily on the grounds that it could not be anticipated that the law governing international credit transfers would be uniform in the entire world by virtue of all States having adopted the Model Law in its entirety. Therefore, it was necessary for parties in States that had adopted the Model Law to know what law would govern the various relationships in an international credit transfer. Although it was possible that some States that would adopt the Model Law might have difficulties in adopting the conflict of laws provisions because of bilateral or multilateral conventions to which they might be a party, that was considered to be no more of a reason not to include such provisions in the Model Law than the existence of national provisions on the substance of the law governing credit transfers would be a reason not to include equivalent substantive provisions in the Model Law (see also A/CN.9/344, para. 114).

Paragraph (1)

4. One of the primary difficulties that the Working Group faced in preparing a legal regime for international credit transfers is the dichotomy between the point of view of the originator and beneficiary of the credit transfer (particularly when neither of those parties is a bank) and that of the implementing banks. From the point of view of the originator and the beneficiary, the transfer is a single operation in which their rights and obligations in respect of the transfer itself should be governed by a single law. From the viewpoint of the banks an international credit transfer is effectuated by a series of individual payment orders giving rise to rights and obligations of the sender and the receiving bank. From that point of view,

each bilateral relationship in the credit transfer chain is a separate banking transaction. Being a separate banking transaction, the law applicable to that relationship might be different from the law applicable to the other bilateral relationships that taken together constitute the credit transfer chain. That, however, is unsatisfactory in that the smooth implementation of international credit transfers requires that the rights and obligations of all parties are consistent with one another.

5. The following proposal was made at the twenty-first session to overcome those difficulties:

> "A funds transfer system may select the law of a particular State to govern the rights and obligations of all parties to a high speed electronic transfer. In the event of any inconsistency between any provision of the law of the State selected by the funds transfer system and any provision of this Model Law, the provision of the law of the State selected by the funds transfer system shall prevail."

6. In support of the proposal it was stated that it was particularly important that one set of rules govern the rights and obligations of all the parties when the transfer was a high-speed transfer (A/CN.9/341, paras. 24 to 32). It was said that, unless there was a means for the parties to elect the application of a single law as was here proposed, the general rules of choice of law reflected in what was then article 15(1) would lead to the result that the law of different States would apply to the different segments of the credit transfer and that there would be no single law that would govern the entire credit transfer. It was pointed out that the technique suggested had already been implemented by CHIPS in its new rule 3 and the law of the state of New York had been chosen to govern the entire transfer if any part of it passed through CHIPS. (The CHIPS rule is set out in A/CN.9/WG.IV/WP.47.)

7. The proposal was rejected by the Working Group on the grounds that, even if it might be reasonable when restricted to the relationships between the banks, the proposal was excessive when it attempted to impose a law upon non-bank originators and beneficiaries that was different from that which would otherwise be applicable to their rights and obligations and that they had not themselves chosen (A/CN.9/341, para. 29). The proposal would have given the funds transfer system, which in fact meant the banks, unfettered freedom to choose any law. The concern was expressed that the funds transfer system might choose a law that was particularly favourable to the banks and unfavourable to the non-bank originators and beneficiaries.

8. At the twenty-first session the Working Group tried to find other rules that would also have led to the application of a single law to the entire transaction. One suggestion was that the substantive provisions of the Model Law applicable to the relations between the originator and the originator's bank should be governed by the law of the originator's bank but that the rest of the credit transfer should be governed by the law of the beneficiary's bank A/CN.9/341, para. 38). Finally, it was decided that the only way to ensure that the Model Law might become applicable to the entire credit transfer was by its adoption by the several States concerned (A/CN.9/341, para. 39).

9. While the Working Group had not been willing to allow any group of banks to decide that the Model Law or any other law would apply to parties to the transfer that were not parties to the choice-of-law agreement, the Working

Group was in favour of permitting the parties to choose any law they wished to govern their relationship (A/CN.9/341, paras. 44 and 45).

10. The Working Group decided that, in the absence of a choice of law by the parties, the law of the receiving bank should apply to that segment of the transfer (A/CN.9/341, paras. 46 and 47). The only exception was that it should be made clear that the Model Law did not purport to determine what law would determine the authority of the actual sender to bind the purported sender under article 4(1). This decision was implemented at the twenty-second session without debate in the Working Group by the current text of paragraph (1) (A/CN.9/344, para. 140).

Paragraph (2)

11. The Working Group noted at its twenty-first session that the question as to whether an actual sender had the authority to bind the purported sender under article 4(1) raised complicated questions of conflict of laws that were not unique to credit transfers. It decided, therefore, that the Model Law should not attempt to solve the question as to which law should apply (A/CN.9/341, para. 46).

12. Comparison with Article 4A. Article 4A-507 is generally consistent with paragraphs (1) and (2), except that Article 4A would apparently apply the law of the receiving bank to the question whether an actual sender was authorized to send a payment order. Article 4A-507(c) is a slightly more complicated version of the provision set out in comment 5 that was rejected by the Working Group at the twenty-first session.